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Supreme Court, U. S.
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No

In the Supreme Court of the United States.

OCTOBER TERM, 1980.

A JUVENILE,
PETITIONER,

v.

COMMONWEALTH OF MASSACHUSETTS,
RESPONDENT.

Petition for Writ of Certiorari to the Supreme Judicial Court of Massachusetts.

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Questions Presented.

1. Is the constitutional protection against Double Jeopardy as articulated in *Burks* v. *United States*, 437 U.S. 1 (1978) violated by forcing a defendant initially convicted on insufficient evidence to submit to a second, *de novo*, trial?

2. Is a two-tier trial system constitutional if it requires a defendant initially convicted on insufficient evidence to submit to a second trial?

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In the
Supreme Court of the United States.

OCTOBER TERM, 1980.

A JUVENILE,
PETITIONER,

v.

COMMONWEALTH OF MASSACHUSETTS,
RESPONDENT.

Petition for Writ of Certiorari to the Supreme Judicial Court of Massachusetts.

The petitioner, a juvenile, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Judicial Court of Massachusetts entered on August 22, 1980.

Opinion Below.

The opinion of the Supreme Judicial Court is reported at Mass. Adv. Sh. (1980) 1939, N.E. 2d (decided Aug.

22, 1980) and is reproduced in the Appendix to this petition. The order of the Supreme Judicial Court of Massachusetts staying the issuance of its rescript order until the filing of and action upon this petition for a writ of certiorari entered on September 17, 1980, is also reproduced in the Appendix to this petition.[1]

Jurisdiction.

The judgment of the Supreme Judicial Court of Massachusetts was entered on August 22, 1980 and this petition is filed within sixty days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

Constitutional Provision and Statute Involved.

The Fifth Amendment to the United States Constitution provides in pertinent part: "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . .."

Mass. General Laws, c. 119, § 56, as amended through St. 1977, c. 431, § 2, Massachusetts' *de novo* appeals statute applicable to the juvenile petitioner, is set out in pertinent part in the Appendix to this petition.

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[1] The opinions of the Supreme Judicial Court in *Lydon* v. *Commonwealth*, Mass. Adv. Sh. (1980) 1915 and *Gibson* v. *Commonwealth*, Mass. Adv. Sh. (1980) 1933, the companion cases to that which the juvenile petitioner prays that this court review, are also set forth in the Appendix to this petition.

Statement of the Case.

The case below came before the Supreme Judicial Court on the following stipulated facts:

The petitioner, a juvenile, was arraigned on November 28, 1978 on complaints alleging him to be a delinquent child by virtue of receiving stolen goods, in violation of Mass. G. L. c. 266, § 60, and possessing burglarious instruments, in violation of Mass. G. L. c. 266, § 49. The trial of the juvenile in the district court took place in the judge's chambers. The government's witnesses consisted of the arresting police officer and three other persons. After the police officer and three other witnesses were sworn, the officer was directed to stand and recite what had happened.

The officer testified that he responded to a radio message and went to an address where he found the juvenile standing in the company of another man. After speaking to the other man the officer arrested the juvenile. The officer then began to testify as to statements made to him by a third person. The juvenile's counsel objected on the grounds of hearsay. The judge overruled the objection and directed the officer to continue. He again began to testify as to statements made by a third person; again the juvenile's counsel objected on the grounds of hearsay. The judge then asked the officer if the witnesses about whose statements he was testifying were present. The officer indicated they were, and the judge then overruled the second objection and directed the officer to continue.

The officer completed his narrative without testifying to any personal knowledge of evidence tending to prove the elements of receiving stolen property. He testified only to statements made by other witnesses, which hearsay statements formed the sole basis on which the issue of delinquency with respect to the charge of receiving stolen property could be

adjudicated. When the officer concluded his testimony the judge asked the other witnesses *jointly* if they would corroborate the officer's testimony; they jointly answered in the affirmative. The Commonwealth presented no admissible evidence sufficient to support a finding of delinquency and the juvenile presented no evidence to the court. On the foregoing facts the judge found the juvenile to be a delinquent child as to both charges as set forth in the complaints.

The juvenile's counsel noted his claim of appeal for trial *de novo* in a timely manner. After being arraigned in the Appellate Division of the Boston Juvenile Court, the appropriate *de novo* court, the juvenile filed a motion to dismiss the two complaints on the grounds that the evidence produced by the government in the initial bench trial was insufficient as a matter of law to sustain the findings of delinquency, and that therefore the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution and principles enunciated in *Burks* v. *United States*, 437 U.S. 1 (1978) and *Greene* v. *Massey*, 437 U.S. 19 (1978) required entry of a judgment of acquittal. The *de novo* court entered an order finding that the initial finding of delinquency was based on insufficient evidence as a matter of law, but declined to dismiss the complaints.

The juvenile thereupon petitioned the Supreme Judicial Court to issue a writ of superintendence pursuant to Mass. G. L. c. 211, § 3, dismissing the complaints on the grounds that the juvenile would be placed twice in jeopardy if subjected to a second trial under these circumstances. The case was reported to the full bench of the Supreme Judicial Court, and was consolidated for argument with two other similar cases, *Lydon* v. *Commonwealth*, Mass. Adv. Sh. (1980) 1915; *Gibson* v. *Commonwealth*, Mass. Adv. Sh. (1980) 1933.[2]

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[2]The question reported to the full bench of the Supreme Judicial Court in the case of *A Juvenile* v. *Commonwealth*, Mass. Adv. Sh. (1980) 1939, 1942,

On August 22, 1980, the Supreme Judicial Court ruled in all three cases that the holding of *Burks* v. *United States*, *supra*, did not apply to Massachusetts' *de novo* appeals system. The Supreme Judicial Court, in a sharply divided opinion in which all seven justices of the Court participated, dismissed the petitions for writs of superintendence. On September 17, 1980 the Supreme Judicial Court granted a stay of the issuance of the rescript order pending the filing of, and action upon, this petition for a writ of certiorari.[3]

Reasons for Granting the Writ.

I. Introduction.

The decision below is in direct conflict with this Court's decisions in *Burks* v. *United States*, 437 U.S. 1 (1978) as applied to the states in *Greene* v. *Massey*, 437 U.S. 19 (1978). It imposes extraordinary and entirely novel constraints on the constitutional protection against being placed twice in jeopardy for the same offense as annunciated in *Burks* v. *United States*, *supra*, in all cases arising under Massachusetts' two-tier trial system, and under the *de novo* systems which exist in some form in one-half of the states. Moreover, if *Burks* v.

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n.4 was: "Whether the juvenile's constitutional right not to be twice put in jeopardy for the same offense would be violated if he were required to stand trial de novo in the Appellate Division of the Boston Juvenile Court on two charges as to which the admissible, nonhearsay evidence presented by the Commonwealth thereon in the prior hearing in the juvenile session of the district court was not sufficient to support a finding of guilty beyond a reasonable doubt. See *Burks* v. *United States*, 437 U.S. 1 (1978)."

[3] The defendants in *Lydon*, *supra*, here sought and have been granted, a similar stay of rescript, and are expected to file a petition with this Court. The defendants in *Gibson* have petitioned the Supreme Judicial Court for a rehearing.

United States, supra, does not apply to Massachusetts' *de novo* system, then the very rationale of the system set forth in *Ludwig* v. *Massachusetts*, 427 U.S. 618 (1976) has been undermined, and the system must be declared unconstitutional.

II. The Opinion Below Places Novel and Unjustified Constraints on the Double Jeopardy Protection Set Forth in *Burks* v. *United States* and Applied to the States by The Fourteenth Amendment.

At the time of the trial of this action on December 19, 1978, the *de novo* system of criminal appeals required the juvenile first to have a delinquency hearing, the equivalent of an adult trial, before a judge without a jury. Mass. G. L. c. 119, § 56, as amended through St. 1977, c. 431, § 2. Upon being adjudicated a delinquent child, he then had the right to appeal and obtain a *de novo* jury trial; he could not, however, obtain a jury trial in the first instance. *Id.*[4]

The juvenile petitioner was found delinquent at the initial bench trial where jeopardy clearly attached. *Breed* v. *Jones*, 421 U.S. 519 (1975); *Commonwealth* v. *Crosby*, Mass. App. Ct. Adv. Sh. (1978) 1104. The juvenile timely claimed his right to appeal and moved to dismiss the complaints, Mass. G. L. c. 277, § 47A, and asserted his Double Jeopardy Claim

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[4] The aforesaid system was substantially the same as that examined by this Court in *Ludwig, supra.* The Massachusetts *de novo* appeals system for the adjudication of criminal complaints against both juveniles and adult criminal offenders was significantly amended by Chapter 478 of the Acts of 1978. Under the new procedure, a defendant may elect to have a jury trial in the first instance or he may elect to have a bench trial prior to a *de novo* jury trial. Mass. G. L. c. 119, § 55A. In the first six months that this procedure was in effect, only 9% of the defendants were tried before a jury in the first instance. *Lydon, supra,* 1918 n.5.

prior to the commencement of the second trial. Although the *de novo* court found that the evidence presented at the first trial was *insufficient as a matter of law* to support the findings of delinquency, it denied the juvenile's motion to dismiss and ordered a new trial. Upon the juvenile's application to the Supreme Judicial Court for a writ of superintendence, that court was squarely presented with the question of whether the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, as interpreted by this Court in *Burks* v. *United States, supra,* was applicable to Massachusetts' *de novo* system of criminal appeals.[5] The Supreme Judicial Court held that *Burks* v. *United States, supra,* was irrelevant to the two-tier trial system. Petitioner strenuously disputes that holding.

In *Burks* v. *United States, supra,* this Court held that the only remedy for a conviction based upon insufficient evidence was a judgment of acquittal. "[O]nce the reviewing court has found the evidence legally insufficient, the only 'just' remedy available for that court is the direction of a judgment of acquittal." *Id.* at 18. The *Burks* Court distinguished between reversals based on trial error and those based on evidentiary insufficiency; in the former case the Double Jeopardy Clause is not a bar to retrial, whereas in the latter case it is. *Id.* at 15.

Burks v. *United States, supra,* arose upon the appeal of a conviction after a jury trial, and not in a two-tier trial *de novo* setting. The issue presented to the Supreme Judicial Court by the instant case and its companions was whether the Massachusetts system of trial *de novo* criminal appeals somehow insulates the lower courts of Massachusetts from the Double

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[5] The Constitution of the Commonwealth provides no protection against Double Jeopardy, although the doctrine has been held to be part of the common law of Massachusetts. *Gallinaro* v. *Commonwealth,* 362 Mass. 728 (1973).

Jeopardy provisions of the Fifth Amendment as articulated in *Burks* v. *United States, supra.* It is clear that, if the petitioner could seek review of the lower court's findings of delinquency, *Burks* v. *United States, supra,* would mandate that such an appellate court reverse the findings and order that a judgment of acquittal be entered. However, the Massachusetts system permits *no* defendant initially convicted on insufficient evidence to obtain such review. As the opinion of the Supreme Judicial Court states: "Under the two-tier system as it is designed to operate, *no court would ever consider this issue,*" *Lydon, supra,* at 1919. (Emphasis added.)

That no court would ever consider the issue, however, does not mean that the offense to the Constitution thereby evaporates. Whether or not defendant has an avenue to seek review of the evidentiary sufficiency of the initial conviction, the Double Jeopardy Clause is violated if he is required to submit to retrial. As this Court stated in *Burks:*

> The Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding. *Burks, supra,* at 11. (Footnote omitted.)

The rationale of *Burks* in prohibiting retrial after appellate review of a jury conviction is clearly set forth:

> Moreover, such an appellate reversal means that the government's case was so lacking that it should not have even been *submitted* to the jury. Since we necessarily afford absolute finality to a jury's *verdict* of acquittal — no matter how erroneous its decision — it is difficult to conceive how society has any greater interest in retrying a defendant when, on review, it is decided as a matter of

law that the jury could not properly have returned a verdict of guilty. *Burks, supra* at 16. (Emphasis supplied.)

Similarily, where the Government's case is so deficient at the initial bench trial that the court could properly return a finding only of not guilty, there is no societal interest in forcing the defendant improperly convicted to undergo a retrial. The Double Jeopardy Clause therefore demands that a defendant so convicted receive an entry of acquittal, and the two-tier trial system must provide for such a resolution. "To hold otherwise would create a purely arbitrary distinction between those in petitioner's position and others who would enjoy the benefit of a correct decision by the District Court." *Id.* at 11, citing *Sumpter* v. *DeGroote*, 552 F.2d 1206, 1211-1212 (7th Cir. 1977).

The rationale employed by the majority of the Supreme Judicial Court in refusing to apply the *Burks* doctrine to the Massachusetts *de novo* system directly contradicts the central holding of *Burks* v. *United States, supra*, and its explicit language. The majority opinion contends that when a criminal defendant "voluntarily elects" to have a bench trial, reserving his right to a *de novo* jury trial, he must then accept the "consequences" of the two-tier procedure. *Lydon* v. *Commonwealth*, Mass. Adv. Sh. (1980) 1915, 1924. By this argument the majority treats the choice of a bench trial and subsequent *de novo* trial as a waiver of any Double Jeopardy claim.

Insofar as the juvenile was tried under the "old" *de novo* system in which he had no choice but to submit to an intitial bench trial before receiving a *de novo* jury trial, Mass. G. L. c. 119, § 56, as amended through St. 1977, c. 431, § 2, such argument is simply inapplicable. However, even under the new *de novo* system the majority's rationale is contrary to that

enunciated in *Burks* v. *United States* insofar as *Burks* held that

> [I]t makes no difference that a defendant has sought a new trial as one of his remedies, or even as the sole remedy. It cannot be meaningfully said that a person "waives" his right to a judgment of acquittal by moving for a new trial. 437 U.S. at 17.

The dissent in *A Juvenile* v. *Commonwealth*, Mass. Adv. Sh. (1980) 1939, and its two companion cases, *Lydon* v. *Commonwealth*, Mass. Adv. Sh. (1980) 1915; *Gibson* v. *Commonwealth*, Mass. Adv. Sh. (1980) 1933, points this out and further argues that a waiver of rights under the Double Jeopardy Clause, like a waiver of other constitutional rights, must be knowing and voluntary. *Lydon* v. *Commonwealth*, *supra*, at 1929-1930 (Liacos J., dissenting). See also *Green* v. *United States*, 355 U.S. 184, 191 (1957). There is no provision under either *de novo* system that a defendant understand he is giving up his right not to be tried a second time after being convicted on evidence insufficient as a matter of law.

The Court has stated:

> where the Double Jeopardy Clause is applicable, its sweep is absolute. There are no "equities" to be balanced, for the Clause has declared a constitutional policy, based on grounds which are not open to judicial examination. *Burks*, *supra*, at 11, n.6.

This absolute sweep, as enunciated in *Burks*, cannot be obviated merely because the Commonwealth chooses not to have a forum for its review.

III. To Preclude the Application of *Burks* is to Destroy the Constitutional Underpinning of the Two-Tier Trial System.

Burks v. *United States* recognizes two classes of cases resulting from appellate reversal of a conviction; the first, arising from trial error, permits retrial, while the second, resulting from evidentiary insufficiency, must result in acquittal. *Ludwig* v. *Commonwealth*, 427 U.S. 618 (1976), acknowledges the constitutionality of the two-tier system only insofar as an appeal of the initial conviction would result *in a new trial:*

> A defendant who elects to be tried *de novo* in Massachusetts is in no different position than is a convicted defendant who successfully appeals on the basis of the trial record and gains a reversal of his conviction *and a remand of his case for a new trial.* Under these circumstances, it long has been clear that the State may reprosecute. *United States* v. *Ball*, 163 U.S. 662 (1896). The only difference between an appeal on the record and an appeal resulting automatically in a new trial is that a convicted defendant in Massachusetts may obtain a "reversal" and a new trial without assignment of error in the proceedings at his first trial. Nothing in the Double Jeopardy Clause prohibits a State from affording a defendant two opportunities to avoid conviction and secure an acquittal. *Id.* at 631-632. (Emphasis added.)

Burks v. *United States*, *supra*, made clear that where a conviction is reversed because it is not supported by sufficient evidence, the rule of *United States* v. *Ball*, 163 U.S. 662 (1896) is inapplicable and the Double Jeopardy Clause will be offended by a retrial.

Ludwig does not permit *de novo* retrial in those cases in which an appellate finding for the defendant must necessarily result in an acquittal. To permit the *de novo* retrial system to operate in blind disregard of those instances where *any* retrial is constitutionally impermissible is to render such a system violative of the Fifth Amendment in a way that was not suggested in *Ludwig* and such a system cannot then withstand constitutional scrutiny.

IV. The Issues Presented here Reflect a Potential Conflict Between Two Decisions of this Court That Affect at Least One Half of the States.

The Supreme Judicial Court's refusal to apply the Double Jeopardy principles enunciated in *Burks* v. *United States, supra,* to Massachusetts' *de novo* system of criminal appeals, has far-reaching implications for the administration of criminal justice in the Commonwealth and throughout the United States. In the first half year of operation of the "new" *de novo* system in Massachusetts 1,593 defendants were first tried without a jury, *Lydon, supra,* at 1918, n.5, and were therefore placing their Double Jeopardy rights at risk. Further, this refusal to apply *Burks* places the whole constitutional underpinning of the *de novo* system in jeopardy. Approximately one-half of all the states operate some form of a two-tier *de novo* appeal system.[6] While no case could be

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[6]See, e.g., Ala. Code Ann. § 12-22-110, 113 (1975); Ariz. Rev. Stat. Ann. §§ 22-371 et seq. (1975 and Supp. 1979); Ark. Stat. Ann. §§ 44-501, 509 (1977); Colo. Rule Crim. Proc. 37(f); Ga. Code Ann. § 6-501 (1975); Ind. Stat. Ann. § 33-10.1-5.9 (Supp. 1980); Kan. Stat. Ann. §§ 22-3610 et seq. (1974); Md. Ann. Code, §§ 12-401 et seq. (1980); Mich. Stat. Ann. § 28.1226 (1978); Miss. Code Ann. § 99-35-1 (1972); Mo. Sup. Ct. Rule 30.33 (1980); Mont. Rev. Code Ann. § 95-2005 (1947 and Supp. 1977); Neb. Rev. Stat. § 25-1937; § 29-610.01 (1979); Nev. Rev. Stat. §§ 189.010 et seq;

found in another *de novo* jurisdiction which considered the issues presented by this petition, it is inevitable that these questions will arise in the other *de novo* jurisdictions, and will therefore present the specter of additional rulings in conflict with the Fifth and Fourteenth Amendments and the decisions of this Court.

Conclusion.

For the reasons hereinbefore set forth, a writ of certiorari should issue to review the judgment and petition of the Supreme Judicial Court of the Commonwealth of Massachusetts.

Respectfully submitted,

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A JUVENILE vs. COMMONWEALTH.

Suffolk. May 6, 1980. — August 22, 1980.

Present: HENNESSEY, C.J., QUIRICO, BRAUCHER, KAPLAN, WILKINS, LIACOS, & ABRAMS, JJ.

Constitutional Law, Double jeopardy. *Supreme Judicial Court*, Superintendence of inferior courts. *Practice, Criminal*, "Two-tier" court system.

CIVIL ACTION commenced in the Supreme Judicial Court for the county of Suffolk on March 1, 1979.

The case was reported by *Abrams*, J.

Anthony M. Doniger for the petitioner.

Michael J. Traft, Assistant District Attorney, for the Commonwealth.

Richard J. Hayes, William J. Leahy, Martin R. Rosenthal & Brownlow M. Speer, for the Massachusetts Defenders Committee, amicus curiae, submitted a brief.

WILKINS, J. This is the third of three cases decided today concerning the possible application of double jeopardy principles expressed in *Burks* v. *United States*, 437 U.S. 1 (1978), to the two-tier trial system used for the disposition of criminal and juvenile cases in the District, Municipal, and Juvenile Courts in the Commonwealth.

Here, we are concerned with delinquency proceedings against a juvenile that were first heard at a bench trial in December, 1978. The juvenile was found guilty on charges of receiving stolen goods and of possession of burglarious instruments. He claims he was entitled to judgments of acquittal in the initial hearing before the judge and, accordingly seeks relief under the general superintendence power of this court (G. L. c. 211, § 3), asserting his constitutional right not to be placed twice in jeopardy. The case comes before us on a reservation and report by a single justice of

this court. The parties have filed a stipulation of facts and certain other stipulations. Following our holding in *Gibson* v. *Commonwealth*, *ante* (1980),[a] we hold that the juvenile has no valid double jeopardy claim.

At the time of the trial of this case, on December 19, 1978, the old two-tier system was in effect.[1] Under that procedure, the hearing in the first instance was required to be before a judge without a jury. G. L. c. 119, § 54, as amended through St. 1973, c. 1073, § 7. A child adjudged a delinquent had the right to appeal and obtain a jury trial,[2] but he could not obtain a jury trial in the first instance. G. L. c. 119, § 56, as amended through St. 1977, c. 431, § 2.

The fifteen-year-old juvenile was arraigned in the Municipal Court of the West Roxbury District (West Roxbury Court) on two complaints alleging him to be a delinquent child by reason of receiving stolen goods (G. L. c. 266, § 60) and by reason of possession of burglarious instruments (G. L. c. 266, § 49). On December 19, 1978, the matters were heard in the judge's chambers. The proceedings were not recorded.[3] The Commonwealth was not represented by counsel. The juvenile was accompanied by his mother and by counsel. In addition to court personnel, a Boston police

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[a] Mass. Adv. Sh. (1980) 1933.

[1] The system in effect today for the trial of a child complained against as a delinquent in a District or Juvenile Court is substantially the same as the two-tier system in effect for an adult complained against in a District or Municipal Court. Compare G. L. c. 119, § 55A, inserted by St. 1978, c. 478, § 56, effective January 1, 1979 (see St. 1978, c. 478, § 343), with G. L. c. 218, §§ 26A and 27A, inserted by St. 1978, c. 478, §§ 188, 189. Any double jeopardy challenge to the present two-tier system for juveniles is controlled by our decision in *Commonwealth* v. *Lydon*, *ante* (1980) (Mass. Adv. Sh. [1980]) 1915.

[2] In this case, the appeal was to the Boston Juvenile Court for a trial before a jury of twelve. G. L. c. 119, § 56, as amended through St. 1977, c. 431, § 2.

[3] District/Municipal Cts. Supp. R. Civ. P. 114 (1975), requires the electronic recordation of all "courtroom proceedings" in cases heard in a juvenile session, subject to the availability and functioning of the appropriate recording devices. We express no opinion on whether the hearing in this matter was, or should have been, a "courtroom proceeding."

officer and three witnesses for the Commonwealth were present. The police officer and the three witnesses were sworn. The police officer was directed to stand and to tell what happened. The officer stated that, responding to a radio message, he went to an address in Roslindale and placed the juvenile under arrest. He found a screwdriver and a piece of coat hanger on the juvenile. When the police officer began to recite statements made to him by a Commonwealth witness, defense counsel objected on the ground of hearsay. The objection was overruled and the officer again testified to statements made by a Commonwealth witness. Defense counsel again objected. The judge inquired if the witnesses whose statements formed the basis of the officer's testimony were in the room. When the officer indicated that they were, the judge directed the officer to continue. The officer did not testify to personal knowledge of evidence tending to prove the elements of receiving stolen property, but did testify to hearsay statements which constituted the only evidence on which the issue of guilt of receiving stolen property could be based. What the entire evidence was on the charge of possession of burglarious instruments is not disclosed by the stipulation. At the conclusion of the officer's testimony, the judge asked the remaining Commonwealth witnesses, jointly, if they could corroborate the officer's testimony. They answered jointly in the affirmative. The parties have stipulated that "[t]he judge declined to take testimony from these witnesses because he felt such testimony was unnecessary." The juvenile offered no evidence. The judge found the juvenile a delinquent child on both charges, and committed him to the Department of Youth Services. The juvenile claimed a trial de novo.

After the juvenile was arraigned in the Appellate Division of the Boston Juvenile Court, his counsel moved to dismiss the complaints, alleging that double jeopardy principles barred a second trial because there was no competent evidence of any element of the alleged offenses and the only evidence was inadmissible hearsay evidence to which there had been timely objection. The judge who heard the mo-

tion declined to dismiss the complaints but, because he concluded that there was insufficient evidence at the first trial to justify a finding of delinquency and because the juvenile was denied an opportunity to confront and cross-examine witnesses, he remanded the cases to the West Roxbury Court for a retrial. Defense counsel then filed a complaint in the single justice session of this court seeking relief under the court's general superintendence power. The single justice stayed proceedings in the West Roxbury Court pending consideration of the complaint and reserved and reported the entire case to this court.[4]

As we have said, the juvenile's double jeopardy argument must fail. His situation is not significantly different from

[4]The reservation and report states that the following is the principal question raised: "Whether the juvenile's constitutional right not to be twice put in jeopardy for the same offense would be violated if he were required to stand trial de novo in the Appellate Division of the Boston Juvenile Court on two charges as to which the admissible, nonhearsay evidence presented by the Commonwealth thereon in the prior hearing in the juvenile session of the district court was not sufficient to support a finding of guilty beyond a reasonable doubt. See *Burks* v. *United States*, 437 U.S. 1 (1978)."

The parties have stipulated that the order remanding the case to the West Roxbury Court "is not a matter placed in issue by the present proceeding." We construe this statement to be an indication by the juvenile that, if his motion to dismiss was rightly denied, he favors a new proceeding in the West Roxbury Court rather than an immediate jury trial in the Appellate Division of the Boston Juvenile Court. Although the juvenile disclaims any challenge to the remand of the proceedings for a new bench trial, he cannot be conceding that those new proceedings would cure a violation of his double jeopardy rights. If double jeopardy rights are applicable to this case, they bar a rehearing in the West Roxbury Court just as they bar a jury trial in the Appellate Division of the Boston Juvenile Court.

Double jeopardy considerations aside, it seems clear that the procedure followed in the West Roxbury Court failed to afford the juvenile rights to which he was entitled. Special Dist. Ct. R. 205 (1976), one of several applicable to juvenile proceedings, requires that a summons issued on a complaint against a child shall have a notice attached to it which advises the juvenile, among other things, that "(4) . . . you have a right . . . to require the complainant to prove any and all charges made against you" and (5) You have the right to be confronted by the person making any accusation against you and to cross-examine that person and any other persons called to testify against you."

the defendant's in *Gibson* v. *Commonwealth, supra.* For the reasons stated there, a double jeopardy claim based on the principles of *Burks* v. *United States* has no validity in our former two-tier trial system.

We need not pass on the question whether the evidence at the bench trial was sufficient to warrant the findings of delinquency. We note, however, that even if a finding of delinquency or guilt is warranted solely on the basis of inadmissible hearsay, it is far from clear that a retrial would be barred. The *Burks* opinion stresses a distinction "between reversals due to trial error and those resulting from evidentiary insufficiency . . . . [I]t is important to consider carefully the respective roles of these two types of reversals in double jeopardy analysis." *Burks* v. *United States, supra* at 15. "In short, reversal for trial error, as distinguished from evidentiary insufficiency, does not constitute a decision to the effect that the government has failed to prove its case." *Id.* The Court in the *Burks* case lists as one category of trial error "the incorrect receipt or rejection of evidence." *Id.* The opinion does not state whether "trial error" alone or "evidentiary insufficiency" as well is involved when the only evidence in support of proof of an element of a crime is evidence that was improperly admitted. The Supreme Court left this question open in *Greene* v. *Massey*, 437 U.S. 19, 26 n.9 (1978), a case decided the same day as the *Burks* case. We need not answer this question in order to decide this case.[5]

[5]Since the decision in the *Greene* case, several courts have been presented with this question. Some courts have held summarily, without any discussion of the reasons for their rulings, that a retrial is barred when evidence presented to the trier of fact was sufficient to warrant a conviction but the properly admitted evidence was not. *Matter of M.L.H.*, 399 A.2d 556, 558-559 (D.C. 1979). *State* v. *Bannister*, 60 Hawaii 658, 660-661 (1979). *State* v. *Abel*, 600 P.2d 994, 999 (Utah 1979). However, a number of courts have given careful consideration to this issue, have articulated their views in well-reasoned opinions, and have concluded that retrial is permissible in such circumstances. *United States* v. *Mandel*, 591 F.2d 1347, 1373-1374 (4th Cir. 1979). *United States* v. *Block*, 590 F.2d 535, 543 (4th Cir. 1978). *Hall* v. *State*, 244 Ga. 86, 93-94 (1979). *Irons* v. *State*, Ind. , (1979) (397 N.E.2d 603, 605-606 [1979]).

The petition for relief under G. L. c. 211, § 3, should be dismissed.

So ordered.

LIACOS, J. (dissenting, with whom Abrams, J., joins). I respectfully dissent for the reasons stated in my opinion in *Commonwealth* v. *Lydon*, *ante*. The record does not make clear the grounds for the judge's decision in the Boston Juvenile Court to remand to the West Roxbury Court. The Boston Juvenile Court should be directed to rule on the sufficiency of the evidence. If the judge determines that the first trial involved mere trial error, retrial should not be barred. If, on the other hand, the motion judge determines that there was a failure of proof at the first hearing, any further proceedings on the same charges should be barred.

Mulry v. *State*, Ind. App. , (1980) (399 N.E.2d 413, 419 [1980]). *State* v. *Boone*, 284 Md. 1, 15-17 (1978). *DiPasquale* v. *State*, 43 Md. App. 574, 579 n.* (1979). *Ex parte Duran*, 581 S.W.2d 683, 684-686 (Tex. Crim. 1979). *State* v. *Frazier*, W.Va. , (1979) (252 S.E.2d 39, 53 [1979]).

In this Commonwealth, prior to the *Burks* case, this court ordered the entry of a judgment of not guilty where a defendant was charged with possession of a narcotic drug, and we concluded that the drug had been seized in violation of the defendant's constitutional rights. *Commonwealth* v. *Silva*, 366 Mass. 402, 410-411 (1974). In that case, a new trial was not warranted, although the evidence admitted at the trial supported the conviction, because it was clear that after suppression of the evidence the Commonwealth could not possibly prove its case in a new trial.

More recently, in a case decided after the *Burks* and *Greene* decisions, this court ordered the entry of judgments of not guilty because, disregarding certain inadmissible evidence, there was no evidence on the record that the defendants had committed the crime. *Commonwealth* v. *Funches*, Mass. , - (1979) (Mass. Adv. Sh. [1979] 2559, 2571-2572). We noted, citing the *Burks* and *Greene* cases, that the Commonwealth had had a fair opportunity to offer whatever proof it could assemble and that, if the inadmissible evidence had been struck, the defendants' motions for directed verdicts should have been allowed. *Id.* at (Mass. Adv. Sh. [1979] at 2572). From a consideration of the evidence offered in the *Funches* case, we think it clear that the Commonwealth had no reasonable prospect of filling in the gap in its proof and thus the circumstances were, in effect, the same as in the *Silva* case, where no cure for the failure of proof could be devised at a second trial.

MICHAEL LYDON & another[1] *vs.* COMMONWEALTH.

Suffolk. May 6, 1980. — August 22, 1980.

Present: HENNESSEY, C.J., QUIRICO, BRAUCHER, KAPLAN, WILKINS, LIACOS, & ABRAMS, JJ.

Constitutional Law, Double jeopardy. *Supreme Judicial Court*, Superintendence of inferior courts. *Practice, Criminal*, "Two-tier" court system.

CIVIL ACTION commenced in the Superior Court for the county of Suffolk on February 5, 1980.

The case was reported by *Wilkins*, J.

Bonnie Spaccarelli Hannon (*Eva S. Nilsen* with her) for Michael Lydon.

Kenneth D'Arcy for Robert McDonald.

Michael J. Traft, Assistant District Attorney, for the Commonwealth.

Richard J. Hayes, William J. Leahy, Martin R. Rosenthal & Brownlow M. Speer, for the Massachusetts Defenders Committee, amicus curiae, submitted a brief.

WILKINS, J. This petition for relief under the general superintendence powers of this court (G. L. c. 211, § 3) is one of three similar cases decided today that raise questions concerning the application of the principles of *Burks* v. *United States*, 437 U.S. 1 (1978), to criminal cases in which the accused has had a trial before a judge without a jury (a bench trial), and, dissatisfied with the result of the bench trial, has sought a de novo trial before a jury. The petitioners, whom we shall call the defendants, argue that the double jeopardy clause of the Fifth Amendment to the Constitution of the United States, as construed in *Burks* v. *United States*, *supra*, requires that the charges against each be dis-

[1] Robert McDonald.

missed following his bench trial because the evidence at the bench trial was insufficient to warrant the convictions.

Under the statutory provisions concerning the trial of cases in the Municipal Court of the City of Boston (Municipal Court), each defendant has the right to a jury trial in the first instance, but the defendants in this case elected instead to have a bench trial, preserving their right to have a jury trial if they were dissatisfied with the result of the bench trial. See G. L. c. 218, § 26A, which is set forth in the margin.[2] The defendants argued to the judge at their joint bench trial in the Municipal Court that the evidence did not warrant their convictions. The judge, however, found them guilty, and the defendants exercised their statutory right to appeal for a trial by a jury of six. Before the jury trial commenced, however, the defendants moved in the Municipal Court's jury trial session to have the charges against them dismissed because the evidence at the bench trial was inadequate to justify their convictions. When this motion was denied, the defendants filed a petition in the single justice session of this court seeking relief under G. L. c. 211, § 3. The single justice stayed the trial of these cases in the jury session of the Municipal Court, and, accepting the defendants' claim that the evidence at the bench trial did not warrant their convictions, reserved and reported two questions to the full bench, which are set forth in the margin.[3] The first of these questions inquires whether a

[2] General Laws c. 218, § 26A, inserted by St. 1978, c. 478, § 188, reads as follows: "Trial of criminal offenses in the Boston municipal court department and in the divisions of the district court department shall be by a jury of six, unless the defendant files a written waiver and consent to be tried by the court without a jury, subject to his right of appeal therefrom for trial by a jury of six pursuant to section twenty-seven A. Such waiver shall not be received unless the defendant is represented by counsel or has filed a written waiver of counsel. Such trials by jury in the first instance shall be in those jury sessions designated by said section twenty-seven A for the hearing of such appeals. All provisions of law and rules of court relative to the hearing and trial of such appeals shall apply also to jury trials in the first instance."

[3] "1. Is it a denial of a defendant's right not to be placed in double jeopardy to require him to go through a jury trial, requested by him with-

defendant would be denied his right not to be placed in double jeopardy if he were required to go through a jury trial, when the evidence at the bench trial was inadequate to support his conviction. The second question concerns the procedural issue whether, assuming the existence of a double jeopardy claim, a jury-trial judge could or should reconsider the question of the sufficiency of the evidence which a bench-trial judge had decided adversely to a defendant.

The issues are important to the effective operation of the two-tier trial system in effect in the District and Municipal Courts of the Commonwealth. The present two-tier system was adopted, effective January 1, 1979, as part of the reorganization of the Commonwealth's judicial system pursuant to Chapter 478 of the Acts of 1978, commonly known as the Court Reorganization Act. In order to achieve a prompt and efficient disposition of the great number of criminal complaints filed each year in the District and Municipal Courts of the Commonwealth, involving relatively minor crimes, the concept of a bench trial was retained from the Commonwealth's earlier two-tier procedure. However, the Court Reorganization Act introduced a procedure that gave a defendant the right to a jury trial without the necessity of a prior bench trial.[4] As we have noted, a criminal defend-

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out waiving his rights, when the evidence at the bench trial was insufficient to warrant a conviction?"

"2. Assuming that a jury trial in such an instance would be a denial of a defendant's right not to be placed in double jeopardy, may the issue of the sufficiency of the evidence at the bench trial be considered again at the trial court level, assuming, of course, that the judge at the bench trial has denied an appropriate request for a ruling that the evidence at the bench trial was insufficient?"

[4]This change in the two-tier system was proposed in the December, 1976, Report on the State of the Massachusetts Courts made by the Governor's Select Committee on Judicial Needs, commonly known as the Cox Committee. Recommendation 19 was "A defendant charged with a crime within the jurisdiction of the District Court should be offered an election between an immediate jury trial and an immediate bench trial subject to his right to claim a new trial with a six-person jury in the District Court." *Id.* at 32. Commenting on its recommendation, the Cox Committee said: "In this manner, the Commonwealth can eliminate the

ant now is granted the choice of a jury trial in the first instance or a bench trial followed, if he so requests, by a de novo trial before a jury (or another judge, if the defendant waives his jury right).[5]

The circumstances of the defendants' trial are not important to the resolution of the questions of law reported to the court. The single justice did not report the issue whether the evidence warranted the defendants' convictions.[6] We treat the case as presenting squarely the question whether double jeopardy principles bar the retrial of a defendant who voluntarily chose to have a bench trial when the evidence at the bench trial was inadequate to warrant a conviction. We conclude that the defendants' voluntary choice of a bench trial and subsequent choice of a trial de novo create a situation in which double jeopardy is not implicated. Thus, the defendants' constitutional challenge to the two-tier trial system, which provides a trial de novo as the sole means of obtaining relief from the unsatisfactory result in their bench trial, is without merit.

The defendants argue that they should not be required to undergo a second trial in order to have their convictions reviewed, because the evidence at their first trial was insuf-

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pitfalls and frustration of the present form of trial de novo and still retain an arrangement which disposes of minor criminal cases fairly yet with minimum cost." *Id.* at 33.

[5]The apparent preference of defendants for an initial bench trial, rather than an immediate jury trial, is demonstrated by data for the six months of operation of the Municipal Court's jury session under the new two-tier system. From January 1, 1979, through June 30, 1979, 1751 complaints were received in that session in which only 158, or about 9%, were complaints tried before a jury in the first instance. [1979] Annual Report, The Office of the Chief Administrative Justice of the Trial Court 35 & 37. We note that thousands of complaints were finally disposed of by convictions at bench trials because the affected defendants did not seek a jury trial. *Id.* at 36.

[6]The single justice did not sit as a reviewing court in determining the sufficiency of the evidence. Thus, any conclusion reached by the single justice on this issue was made for the purpose of reporting clearly framed questions to the full bench and is not an adjudication of the rights of the parties in this case.

ficient to warrant a conviction. They claim that a trial de novo would put them twice in jeopardy for the same crime, in contravention of the Fifth Amendment to the Constitution of the United States, made applicable to the States through the Fourteenth Amendment.[7] *Benton* v. *Maryland*, 395 U.S. 784, 794 (1969). The defendants rely on *Burks* v. *United States*, 437 U.S. 1 (1978), to support their double jeopardy claim.[8] In that case, the Sixth Circuit Court of Appeals had reversed Burk's conviction because the evidence did not warrant a guilty finding and had remanded the case for consideration whether the circumstances warranted a new trial. *United States* v. *Burks*, 547 F.2d 968, 970 (6th Cir. 1976). The Supreme Court held, however, that it would be improper to retry Burks. The Court stated that a judgment of acquittal was required notwithstanding the fact that Burks had requested a new trial. 437 U.S. at 17-18.

The *Burks* case involved different circumstances from those before us because it dealt with an appellate determination that the evidence at trial did not warrant a conviction and a further determination that the double jeopardy clause barred a retrial in those circumstances. Burks was tried in a judicial system that provided for appellate review. No reviewing court has ruled on the sufficiency of the evidence at the bench trial in the present case. Under the two-tier system as it is designed to operate, no court would ever consider this issue. Thus, *Burks* v. *United States* is not applicable. The Court's holding in the *Burks* case was not that "the Double Jeopardy Clause precludes a second trial

[7] If the defendants have a valid double jeopardy claim, it properly should be dealt with in some forum before any second trial. *Costarelli* v. *Commonwealth*, 374 Mass. 677, 680 (1978) (Mass. Adv. Sh. [1978] 734, 737). Immediate relief would be appropriate because, in such a case, the second trial itself would offend the constitutional guarantee. *Id. Abney* v. *United States*, 431 U.S. 651, 660-661 (1977) ("It is a guarantee against being twice put to *trial* for the same offense").

[8] On the same day as the *Burks* decision, the Supreme Court held in *Greene* v. *Massey*, 437 U.S. 19, 24 (1978), that the *Burks* principle was applicable to the States through the Fourteenth Amendment.

once the reviewing court has found the evidence legally insufficient." 437 U.S. at 18 (emphasis supplied).

The Court in the *Burks* case did not consider the question involved in the case before us, namely, whether under double jeopardy principles a defendant convicted on inadequate evidence at a bench trial has a right to a reconsideration of that ruling prior to a trial de novo. The defendants seek to extend the holding in *Burks* v. *United States, supra,* by arguing that that case requires the Commonwealth to provide a procedure by which the defendants can have another judge pass on the sufficiency of the evidence presented at his bench trial.

The defendants are correct in stating that, if they were to obtain a judgment of acquittal due to the insufficiency of evidence presented at their trial, they could not be retried. Double jeopardy protection under the Federal Constitution is afforded to criminal defendants regardless of whether such acquittal occurs at a bench trial, *Kepner* v. *United States,* 195 U.S. 100, 133 (1904), at a jury trial, *United States* v. *Ball,* 163 U.S. 662, 671 (1896), or on appeal, *Burks* v. *United States, supra.* Massachusetts heeds this constitutional mandate.[9] *Ludwig* v. *Massachusetts,* 427 U.S. 618, 631 (1976). But double jeopardy protection is not applicable to a defendant who is convicted and seeks reversal of

[9]The *Burks* opinion introduced no new concept in the disposition of criminal appeals in this Commonwealth. At least in recent times, an appellate determination that the evidence did not warrant a conviction has resulted in an order for the dismissal of the charges and not in a new trial. See *Commonwealth* v. *Delgado,* 367 Mass. 432, 439 (1975); *Commonwealth* v. *Silva,* 366 Mass. 402, 410-411 (1974) (If motion to suppress had been allowed, as it should have been, a directed verdict would have been required. Judgment of not guilty ordered). After the *Burks* decision, we ordered the entry of a judgment of not guilty, citing the *Burks* case, where the trial judge erroneously failed to strike the testimony of a witness and, when struck, the remaining evidence did not warrant guilty findings. *Commonwealth* v. *Funches,* Mass. , (1979) (Mass. Adv. Sh. [1979] 2559, 2572). It was clear in the *Funches* case that the Commonwealth could not cure the insufficiency in the proof. See further discussion of the *Silva* and *Funches* cases in *A Juvenile* v. *Commonwealth, post* 1939 n.5.

such conviction by resort to a second-tier trial. The distinction between a convicted defendant and an acquitted defendant in terms of double jeopardy protection was established in *United States* v. *Ball, supra* at 671-672. The validity of this distinction was reconfirmed in *United States* v. *Scott*, 437 U.S. 82, 88-89 (1978),[10] a case decided the same day as *Burks* v. *United States, supra.*

The defendants' argument that the Commonwealth has no legitimate state interest in retrying them overlooks the fact that the Commonwealth did not seek to retry them. The defendants were convicted of the crime of possession of burglarious instruments with the intent to commit larceny. The Commonwealth was content with that disposition. Although the defendants argue that the findings were erroneous, the convictions stood until the defendants requested a trial de novo, which was the only avenue of relief available to them.[11] The Commonwealth did not force the defendants to submit to a second trial. It simply did not provide the defendants a right of appeal or other review from their bench trial. None is constitutionally required. *Griffin* v. *Illinois*, 351 U.S. 12, 18 (1956).

A defendant's choice to have a bench trial in the first instance, without any prospect of review of errors occurring in the course of that trial, means that a considerable variety

[10] In the *Scott* case, the defendant was successful in obtaining a dismissal of an indictment because of preindictment delay. The Supreme Court, by a five-to-four vote, held that the government could appeal the dismissal because, if the appeal were successful, the defendant properly could be tried on the indictment without violating the defendant's double jeopardy rights.

[11] The situation here is analogous to the situation in *United States* v. *Ball*, 163 U.S. 662 (1896), where the Court held that the defendants' convictions were based on a fatally defective indictment. The Court held that, although the convictions below would not stand on appeal, "yet, if the court had jurisdiction of the cause and of the party, its judgment is not void, but only voidable by writ of error; and, until so avoided, cannot be collaterally impeached. If the judgment is upon a verdict of guilty, and unreversed, it stands good, and warrants the punishment of the defendant accordingly, and he could not be discharged by a writ of *habeas corpus*." *Id.* at 669-670.

of errors might occur from which he could not obtain any relief. Many of these errors are of a type that could have a considerable effect on the result of the trial. The judge might misapply the law or improperly admit or exclude evidence, to the defendant's disadvantage (or advantage). There might be prosecutorial misconduct, or defense counsel's performance might be inadequate in a constitutional sense. However, errors of this nature in the trial of a case, even when they involve a misapplication of constitutional principles, have never been regarded as presenting a double jeopardy issue, that is, barring a second trial on double jeopardy grounds. "In short, reversal for trial error, as distinguished from evidentiary insufficiency, does not constitute a decision to the effect that the government has failed to prove its case." *Burks* v. *United States*, 437 U.S. at 15. And yet, an accused runs the risk of such errors by choosing to have an initial bench trial. We have never indicated that in making such an election the defendant must have knowingly considered and voluntarily waived all the potential errors of constitutional dimension.[12] But see *Ciummei* v. *Commonwealth*, Mass. (1979)[a] (explicit waiver of constitutional right of trial by jury required).

The two-tier court system has already withstood constitutional challenge in the United States Supreme Court. *Ludwig* v. *Massachusetts*, 427 U.S. 618 (1976). *Colten* v. *Kentucky*, 407 U.S. 104 (1972). Some form of two-tier system is in effect in approximately one-half of the States. *Colten* v. *Kentucky*, *supra* at 112 n.4. It is difficult to conceive that the Supreme Court intended in its *Burks* decision to hold, by implication, that such a widely adopted system for dealing

[12] The United States Supreme Court has noted that "the inferior courts are not designed or equipped to conduct error-free trials, or to insure full recognition of constitutional freedoms. They are courts of convenience, to provide speedy and inexpensive means of disposition of charges of minor offenses." *Colten* v. *Kentucky*, 407 U.S. 104, 117 (1972), quoting from *Colten* v. *Commonwealth*, 467 S.W.2d 374, 379 (Ky. 1971).

[a] Mass. Adv. Sh. (1979) 1838.

with less serious crimes is unconstitutional. See *Greene* v. *Massey*, 437 U.S. 19, 27 (1978) (Rehnquist, J., concurring).

The present Massachusetts two-tier system is indistinguishable from that of the Kentucky court system which was challenged on double jeopardy grounds in *Colten* v. *Kentucky*, *supra*, except that to avoid a trial at the first level of the Kentucky system, a defendant had to plead guilty in the inferior court and then request a trial "de novo." *Id.* at 112. A defendant tried in the District and Municipal Courts of Massachusetts may simply obtain a jury trial in the first instance without the stigma of a guilty plea on his record. But neither the Kentucky court system examined in *Colten* v. *Kentucky* nor the present Massachusetts two-tier system imposes two trials on criminal defendants. Thus, no double jeopardy problem is presented. *Colten* v. *Kentucky*, *supra* at 119-120.

The defendants in the present case elected to follow the procedure by which they obtained a bench trial, preserving their right to seek a jury trial if they were dissatisfied with the results of the bench trial. They could have obtained a jury trial in the first instance with a right of appellate review, and no question of double jeopardy would have arisen at the trial level.

The procedure by which a defendant elects a trial by a judge without a jury in the first instance is not casual. Section 26A of G. L. c. 218, inserted by St. 1978, c. 478, § 188, carefully defines the defendant's right to assure that the defendant makes an informed choice. Trials "shall be by a jury of six, unless the defendant files a written waiver and consent to be tried by the court without a jury, subject to his right of appeal therefrom for trial by a jury of six pursuant to [§ 27A]." *Id.* No such waiver may be received "unless the defendant is represented by counsel or has filed a written waiver of counsel." *Id.*[13]

[13] Rule 12(A) of the Initial Rules of Criminal Procedure for the District Courts, effective on January 14, 1980, and not applicable to these defend-

A defendant obtains certain distinct advantages in having a bench trial followed by a jury trial, if he wishes. A bench trial serves as a means of discovery and recordation of the prosecution's testimony. Indeed, the judge may find the defendant not guilty. That would end the matter. A bench trial takes less time than a jury trial, offering the defendant a less expensive and less time consuming process. And, if the defendant does not like the result, he may obtain a second chance before a jury or, if he waives a jury, before a second judge, unfettered by the adverse decision previously made. The *Burks* opinion does not alter the statement in *Ludwig* v. *Massachusetts*, 427 U.S. 618, 632 (1976), that "[n]othing in the Double Jeopardy Clause prohibits a State from affording a defendant two opportunities to avoid conviction and secure an acquittal."

We acknowledge that "where the Double Jeopardy Clause is applicable, its sweep is absolute." *Burks* v. *United States*, 437 U.S. at 11 n.6. There are no equities to be balanced when the clause applies. We think that no double jeopardy is involved, however, when a criminal defendant voluntarily elects to accept the consequences of a procedure such as the optional two-tier system now in effect in the Commonwealth. We concur with the conclusion of the United States Supreme Court "that the Double Jeopardy Clause, which guards against Government oppression, does not relieve a defendant from the consequences of his voluntary choice." *United States* v. *Scott*, 437 U.S. 82, 99 (1978).

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ants because they were arraigned in the Municipal Court of the City of Boston (and before January 14, 1980), provides in part:

> "The oral notice of right to first-instance jury trial shall include a statement to the defendant that if he or she waives this right he or she will receive a trial before a judge and if not satisfied with the results of that trial will be able to appeal for a new trial before a jury."

In light of this opinion, consideration might be given to enlarging the consent form so that the defendant acknowledges that his only avenue of relief from any error in the bench trial is a trial de novo.

In effect, allowing a defendant to have a trial de novo, like requiring "a criminal defendant to stand trial again after he has successfully invoked a statutory right of appeal to upset his first conviction[,] is not an act of governmental oppression of the sort against which the Double Jeopardy Clause was intended to protect." *Id.* at 91.

We have discussed the double jeopardy issue in terms of the requirements of the Constitution of the United States. No separate argument has been made under the law of the Commonwealth, including the Massachusetts Constitution. The reported question was not limited to the Federal constitutional issue nor expressed solely in terms of constitutional rights. Although this court has never explicitly stated that our Declaration of Rights includes a double jeopardy guarantee (see *Commonwealth* v. *Cepulonis*, 374 Mass. 487, 491-492 [1978][b]), protection against double jeopardy in this Commonwealth has long been part of the common law. See *Gallinaro* v. *Commonwealth*, 362 Mass. 728, 736-737 (1973).

As a matter of common law, we have never held that double jeopardy principles are involved when a criminal defendant, who may have been erroneously convicted at a bench trial, is afforded no appellate or other review of the alleged error but is allowed to seek relief solely by the means of a new trial completely divorced from the record of the prior trial. See *Mann* v. *Commonwealth*, 359 Mass. 661, 664 (1971). The claim of appeal for a second trial has been treated as simply vacating the judgment of the court at the bench trial. See *Enbinder* v. *Commonwealth*, 368 Mass. 214, 217, cert. denied, 423 U.S. 1024 (1975), and cases cited. For the same reasons stated in our discussion on the Constitution of the United States, the circumstances of this case do not offend any provision in the Constitution of the Commonwealth extending jeopardy protection.

We come then to the question, which is rendered largely academic by what we have already decided, namely wheth-

[b] Mass. Adv. Sh. (1978) 477, 482.

er the jury-trial judge could pass on the defendants' motion to dismiss on grounds of double jeopardy. We conclude that the jury trial session is the appropriate forum for consideration of double jeopardy claim asserted after a bench trial. If there is a valid double jeopardy claim, it should be dealt with before, rather than after, the second trial. See note 7 *supra*.

In *Whitmarsh* v. *Commonwealth*, 366 Mass. 212, 216 (1974), appeal dismissed, 421 U.S. 959 (1975), we denied relief under G. L. c. 211, § 3, noting the availability of relief for a double jeopardy claim by means of a motion to dismiss filed in the Superior Court after a District Court bench trial. That opinion considered the procedure for raising double jeopardy issues under the former two-tier system,[14] but the result is no different under the current two-tier system. Rule 13 (c) (2) of the Massachusetts Rules of Criminal Procedure (Mass. [1979]) provides that "[a] defense or objection which is capable of determination without trial of the general issue shall be raised before trial by motion." Consequently, the defendants' motion to dismiss properly should have been considered on the merits in the jury trial session. See *A Juvenile* v. *Commonwealth*, Mass. , - (1980);[c] *Connaughton* v. *District Court of Chelsea*, 371 Mass. 301 (1976).

We answer the first reported question in the negative. A defendant is not placed in double jeopardy merely because his only avenue of relief from a conviction based on insufficient evidence at a voluntarily sought bench trial is a trial de novo. As to the second reported question, the jury-trial judge would have no occasion to consider the sufficiency of the evidence at the bench trial. Because there would be no valid double jeopardy claim, even if the evidence were insufficient to warrant the conviction, the jury-trial judge's

[14] See *Gibson*, *post*, where we discuss the jurisdiction of the Superior Court to consider such a motion under the former two-tier system.

[c] Mass. Adv. Sh. (1980) 1131, 1136-1137.

only option would be to deny such a motion. The case is remanded to the county court for the entry of judgment.

So ordered.

LIACOS, J. (concurring in part and dissenting in part, with whom Abrams, J., joins). Today the court addresses the constitutionality of an aspect of the optional two-tier system of criminal trials described in part in G. L. c. 218, § 26A, inserted by St. 1978, c. 478, § 188. Under this system, a defendant who chooses a bench trial and is convicted on insufficient evidence can be retried de novo to a jury, but he has no other avenue of relief. The majority conclude that this practice does not offend the double jeopardy clause of the Federal Constitution. I respectfully disagree.

The double jeopardy clause creates a constitutional policy against multiple trials of a criminal defendant. See *Green* v. *United States*, 355 U.S. 184, 187-188 (1957). If the prosecution received "one fair opportunity to offer whatever proof it could assemble," but the proof was insufficient, retrial of the defendant would frustrate the purpose of the double jeopardy clause. *Burks* v. *United States*, 437 U.S. 1, 16 (1978). See *Greene* v. *Massey*, 437 U.S. 19 (1978).[1]

The majority declare that "double jeopardy protection is not applicable to a defendant who is convicted and seeks reversal of such conviction by resort to a second-tier trial."

[1] Our previous two-tier system survived a general double jeopardy challenge. *Ludwig* v. *Massachusetts*, 427 U.S. 618 (1976). A system somewhat similar to our present one withstood a general challenge in *Colten* v. *Kentucky*, 407 U.S. 104 (1972). However, neither decision addressed the situation in which evidence at the first trial was insufficient. See *Gibson* v. *Commonwealth*, *post* (1980) (Mass. Adv. Sh. [1980] 1933). Both *Ludwig* and *Colten* were decided, moreover, prior to *Burks*, in which the Court first drew a clear distinction between failure of proof and mere trial error, thus overruling a number of earlier cases dealing with double jeopardy claims.

Supra at .[a] *Burks*, however, focused on the nature of the error committed at the first trial, not on acquittal or conviction. Thus, if the error is mere "trial error," which "implies nothing with respect to the guilt or innocence of the defendant," the defendant may be retried. *Burks*, *supra* at 15. If, on the other hand, the government failed to prove its case, retrial is impermissible. *Id.* at 16. The evil at stake is that a defendant against whom the prosecution has not been able to muster even a prima facie case must endure a second trial.

The majority impose a precondition for attachment of the defendants' double jeopardy rights; an appellate determination that the evidence was insufficient to convict him.[2] In so doing, the majority disregard the substantive mandate of *Burks* and fix upon a formal nicety wholly unrelated to the purposes of the double jeopardy clause. If a defendant is convicted on insufficient evidence, he cannot be retried, and it should matter not at all whether an appellate court has confirmed the insufficiency.

The double joepardy clause requires the prosecution to prove its case in one trial. If the prosecution's evidence was so weak that no reasonable trier of fact could conclude that the defendants were guilty beyond a reasonable doubt, this principle applies with special force. The majority choose to

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[a] Mass. Adv. Sh. (1980) 1919.

[2] The majority cite *United States* v. *Scott*, 437 U.S. 82, 88-89 (1978), in support of their distinction. *Supra* at (Mass. Adv. Sh. [1980] at 1921). *Scott* involved an appeal by the government. But, in summary, that discussion merely states: "The successful appeal of a judgment of conviction, on any ground other than the insufficiency of the evidence to support the verdict, . . . poses no bar to further prosecution on the same charge." *Id.* at 90-91. For a defendant convicted at a first trial, the *Scott* opinion does not abrogate the distinction between evidentiary insufficiency and trial error. Indeed, the careful distinctions drawn in *Scott* as to dismissal of an indictment for reasons other than failure of proof support my view. "In the present case, the District Court's dismissal of the first count of the indictment [after the close of all of the evidence] was based upon a claim of preindictment delay and not on the court's conclusion that the Government had not produced sufficient evidence to establish the guilt of the defendant." *Id.* at 95.

ignore this logic. They would put the defendants here through the "embarrassment, expense and ordeal" of a second trial, and would consign them for a second time to "a continuing state of anxiety and insecurity." *Green* v. *United States*, *supra* at 187. They refuse to recognize that the double jeopardy clause safeguards against just such mistreatment at the hands of the criminal justice system. After today, the enforceability of the *Burks* right will depend largely upon the sufferance of the Legislature. If the Legislature chooses to provide a criminal defendant with no avenue of relief other than a second trial, the defendant's constitutional right must languish among shadows.

The majority opinion states: "We think that no double jeopardy is involved . . . when a criminal defendant voluntarily elects to accept the consequences of a procedure such as the optional two-tier system now in effect in the Commonwealth." *Supra* at .[b] The majority point out that the defendants, not the Commonwealth, sought a trial de novo and that the Commonwealth simply provided the defendants with no other right to review of the bench trial.

The majority seem to treat a defendant's "voluntary" choice of a bench trial and subsequent "choice" of a trial de novo as a waiver of his double jeopardy rights.[3] But waiver of rights under the double jeopardy clause, like waiver of other constitutional rights, must be knowing and voluntary. *Green* v. *United States*, *supra* at 191. Even if the Commonwealth is not obliged to furnish a defendant with an avenue of appeal, a defendant choosing the bench trial should

[b] Mass. Adv. Sh. (1980) at 1924.

[3] "We conclude that the defendants' voluntary choice of a bench trial and subsequent choice of a trial de novo create a situation in which double jeopardy is not implicated." *Supra* at (Mass. Adv. Sh. [1980] at 1918). "[D]ouble jeopardy protection is not applicable to a defendant who is convicted and seeks reversal of such conviction by resort to a second-tier trial." *Supra* at (Mass. Adv. Sh. [1980] at 1920-1921). Such language disregards the clear language of *Burks* to the contrary: "In our view it makes no difference that a defendant has sought a new trial as one of his remedies, or even as the sole remedy." *Burks* v. *United States*, 437 U.S. 1, 17 (1978).

understand what he is giving up. Yet the majority seem oblivious to this principle. They make no provision that a defendant understand he is giving up his right not to be tried a second time after being convicted on insufficient evidence.[4] However, if a defendant's choice of a bench trial was not made intelligently, then he did not choose to accept the consequences of his choice. He did not choose to make a second trial his only avenue of relief from a conviction in the first trial. If a defendant's initial choice was not intelligent, it is pointless to say that the Commonwealth does not force him to endure a second trial.

The majority do not suggest that the present two-tier system makes provision for explicit waiver of the right to avoid a second trial after a bench trial conviction on insufficient evidence. Nor does such a waiver appear affirmatively in the report or the record. See *Ciummei* v. *Commonwealth*, Mass. (1979).[c] Therefore, I would answer the first reported question in the affirmative.

On the second question, as if to carry their sophistical exercise a step further, the majority assert that the defendants, in a case such as this one, can raise their double jeopardy claims before the jury-trial judge. But what can be the purpose of this review? According to the majority, the defendants have no double jeopardy claim. Thus, for defendants such as Michael Lydon and Robert McDonald, the procedure before the jury-trial judge can only be charade in which the defendants' motion to dismiss inevitably will be denied. Perhaps the real purpose of this review is to give the jury-trial judge a chance to rule on the sufficiency of the evidence and thus to nullify the inexplicable result reached today.[5]

[4] The majority point out that a defendant who chooses a bench trial may obtain tactical and other advantages. *Supra* at (Mass. Adv. Sh. [1980] at 1923). However, a defendant's choice is not meaningful, in constitutional terms, unless he also understands that he is giving up his constitutional right. *Johnson* v. *Zerbst*, 304 U.S. 458 (1938).

[c] Mass. Adv. Sh. (1979) 1838.

[5] The majority do not state that this review is available for all double jeopardy claims arising from the bench trial, or for claims unlike Lydon's and McDonald's.

Because I would answer the first reported question in the affirmative, I concur with the majority's answer to the second question. The jury trial session is the proper forum for a defendant to raise a double jeopardy claim arising at his bench trial.

RICHARD GIBSON vs. COMMONWEALTH.

Suffolk. May 6, 1980. — August 22, 1980.

Present: HENNESSEY, C.J., QUIRICO, BRAUCHER, KAPLAN, WILKINS, LIACOS, & ABRAMS, JJ.

Constitutional Law, Double jeopardy. *Supreme Judicial Court*, Superintendence of inferior courts. *Practice, Criminal*, "Two-tier" court system.

CIVIL ACTION commenced in the Supreme Judicial Court for the county of Suffolk on April 27, 1979.

The case was reported by *Quirico*, J.

Steven M. Wise for the petitioner.

Robert M. Payton, Assistant District Attorney, for the Commonwealth.

Richard J. Hayes, William J. Leahy, Martin R. Rosenthal & Brownlow M. Speer, for the Massachusetts Defenders Committee, amicus curiae, submitted a brief.

WILKINS, J. This is the second case we decide today involving the claim of an accused that he would be denied his constitutional right against being placed twice in jeopardy if a new trial is offered as the only relief from his conviction on insufficient evidence presented at a bench trial in a District, Municipal, or Juvenile Court.

On May 4, 1978, the petitioner, whom we shall call the defendant, was convicted, after a bench trial in the Second Plymouth Division of the District Court Department sitting at Hingham, of using a motor vehicle without authority (G. L. c. 90, § 24) and of receiving stolen goods (G. L. c. 266, § 60). The proceeding was recorded on tape. The defendant moved for a finding of not guilty on both charges at the close of the Commonwealth's case. He claimed an appeal for a trial de novo before a jury of twelve in the Superior Court in Plymouth County. See G. L. c. 278, § 18,

as amended through St. 1974, c. 167. He moved in the Superior Court for dismissal of the charges and for judgments of acquittal on the charges, alleging that there was insufficient admissible evidence at his first, or bench, trial to warrant a conviction. He argued that a trial de novo would violate his double jeopardy rights and would deny him due process of law under the Fourteenth Amendment to the Constitution of the United States.

In a carefully considered order concerning the motion to dismiss, entered on April 9, 1979, a judge of the Superior Court noted that, in light of the decision in *Burks* v. *United States*, 437 U.S. 1 (1978), the defendant's double jeopardy claim was one of substance. He concluded that "if the defendant's conviction after a bench trial in the District Court is based on insufficient evidence as a matter of law, he is not subject to further criminal proceedings upon these charges." However, he concluded further that the Superior Court had no jurisdiction to review the defendant's double jeopardy claim and denied the motion to dismiss. He suggested that relief might be obtained in an appellate court, perhaps by a writ of error.

The defendant thereafter filed a petition seeking relief under this court's power of general superintendence. G. L. c. 211, § 3. A single justice reported the entire case to the full court, reciting three principal questions, that are set forth in the margin.[1] These questions concern (a) the right

[1] "(a) Whether under the two-tier system for the trial of criminal cases in effect when the defendant was tried in the District Court and his appeal therefrom to the Superior Court for a trial de novo, the defendant was entitled, by a pretrial motion in the Superior Court, to raise the issue whether the evidence which was before the District Court was sufficient to support the finding in the latter court that the defendant was guilty beyond a reasonable doubt of the crimes charged against him;

"(b) Whether the Superior Court has jurisdiction to receive, hear and decide such a motion; and

"(c) Whether the defendant's constitutional right not to be twice put in jeopardy for the same offense would be violated if he were required to stand trial de novo in the Superior Court on any complaint as to which the evidence presented by the Commonwealth thereon in the prior trial in the District Court was not sufficient to support a finding of guilty beyond a reasonable doubt. See *Burks* v. *United States*, 437 U.S. 1 (1978)."

of the defendant to raise by a pretrial motion in the Superior Court the issue of the insufficiency of the evidence at his bench trial, (b) the jurisdiction of the Superior Court to hear such a motion, and (c) the defendant's double jeopardy rights if the evidence at his bench trial was not sufficient to support findings of guilt beyond a reasonable doubt.

The defendant's trial occurred at a time when the former two-tier procedure was in effect in the Commonwealth. Under that procedure, a defendant was tried first in the District Court without a jury and, if found guilty, could appeal to the Superior Court for a trial before a jury of twelve or to the District Court before a jury of six. G. L. c. 278, § 18, as amended through St. 1974, c. 167. The defendant did not have the option of having a jury trial in the first instance as is the case under the current two-tier system.[2] See *Lydon* v. *Commonwealth*, *ante* (1980).[3]

We conclude that the principles of the *Burks* case apply only when there is an appellate determination that the evidence at trial was insufficient. Because neither the former Massachusetts trial system nor the present one provides any appellate review of errors or omissions in the bench trial, the principles underlying the *Burks* case have no application to these two-tier systems. We conclude further that, on proper motion, a judge of the Superior Court should pass on a double jeopardy challenge of the character involved here.

The defendant argues that the *Burks* opinion stands for the proposition that a person convicted at a bench trial on insufficient evidence may not be retried regardless of the fact that the only avenue of relief from such conviction is a

[2] However, as the United States Supreme Court observed in *Ludwig* v. *Massachusetts*, 427 U.S. 618, 621 (1976), an accused tried under the former two-tier system in Massachusetts could substantially avoid a trial in the first tier "by an established, informal procedure known as 'admitting sufficient findings of fact.'" The Court noted that an "accused may enjoy his right to trial by jury expeditiously by invoking the above-described procedure of 'admitting sufficient findings of fact.' He, therefore, need not pursue, in any real sense, a defense at the lower tier." *Id.* at 626.

[3] Mass. Adv. Sh. (1980) 1915.

trial de novo. The argument rests on the assertion that if, as in the *Burks* case, an appellant who successfully challenges the sufficiency of the evidence must be acquitted, then a defendant convicted on insufficent evidence must have available, prior to a second trial, some procedure by which he can secure an acquittal. The defendant claims that the Massachusetts two-tier trial system is unconstitutional because it does not provide for appellate review but offers an improperly convicted defendant only another trial as a cure, that is, a second trial at which the prosecution will have a chance to overcome its earlier failure to meet its proof. In short, the defendant argues that principles underlying the *Burks* decision imply that an accused who is obliged to undergo a bench trial, is found guilty on evidence not sufficient to warrant a conviction, and has no avenue of relief but to seek a de novo jury trial is denied his right under the double jeopardy clause to have the charges against him dismissed.[3]

Our opinion in *Lydon* v. *Commonwealth*, *supra*, considers and rejects the proposition that the double jeopardy clause of the Fifth Amendment, made applicable to the States by the Fourteenth Amendment, requires a State to provide, in all instances, a procedure for review of the sufficiency of the evidence at a bench trial. Much of the reasoning of that opinion applies here. In our *Lydon* opinion, we noted that "[t]he two-tier court system has already withstood constitutional challenge [on double jeopardy grounds] in the United States Supreme Court. *Ludwig* v. *Massachu-*

[3]This was the view of the Superior Court judge who heard the defendant's motion to dismiss.

The Commonwealth in this case largely accepts this view as well, submitting that an affirmative answer to reported question (c) is correct "provided that it has been further determined that the Commonwealth has had a full and fair opportunity to present whatever evidence it could assemble upon the first occasion where the defendant had been placed in jeopardy." The position of the District Attorney for the Plymouth district on this point is contrary to the position taken by the District Attorney for the Suffolk district in the *Lydon*, *supra*, and *Juvenile*, *post* (1980) (Mass. Adv. Sh. [1980] 1939), cases decided today.

setts, 427 U.S. 618 (1976). *Colten* v. *Kentucky*, 407 U.S. 104 (1972)." Approximately half the States have some form of two-tier system. *Colten* v. *Kentucky*, *supra* at 112 n.4. The *Burks* opinion makes no mention of two-tier trial system and cites neither the *Ludwig* nor the *Colten* cases. We are unwilling to conclude that the Supreme Court intended in its *Burks* opinion to invalidate by implication such a widely used system for the disposition of cases involving less serious crimes. We have found no reported case in any other jurisdiction in which a two-tier criminal defendant has advanced a double jeopardy argument based on an extension of the holding in the *Burks* case. We do not find in the *Burks* opinion any indication that the Supreme Court has abandoned its position in *Ludwig* v. *Massachusetts*, 427 U.S. 618 (1976), where the Court upheld the very same procedure that is involved in this case. We hold that the Supreme Court's ruling in the *Ludwig* case is controlling here.

We come then to the question whether a defendant under the former two-tier system could present to the Superior Court his challenge based on the double jeopardy clause. We think that the Superior Court was the appropriate forum for such a claim and that, at least until the matter is passed on there, a single justice of this court need not grant relief under this court's general superintendence power (G. L. c. 211, § 3). See *Whitmarsh* v. *Commonwealth*, 366 Mass. 212, 216 (1974), appeal dismissed, 421 U.S. 959 (1975). At the time the defendant's motion was filed in the Superior Court and considered there (see G. L. c. 277, § 47A, as amended through St. 1978, c. 478, § 298 [effective January 1, 1979 (St. 1978, c. 478, § 343)]), the applicable statute provided that in criminal proceedings "[a]ny . . . objection which is capable of determination without the trial of the general issue may be raised before trial by motion."[4] Consequently, the defendant's motion to dismiss

[4]Today, G. L. c. 277, § 47A, as appearing in St. 1979, c. 344, § 39 (by § 51, effective July 1, 1979), has been amended, deferring many procedural matters to the Massachusetts Rules of Criminal Procedure, which

properly should have been considered on its merits in the Superior Court. See *Lydon* v. *Commonwealth, supra.*

Because the defendant has no valid double jeopardy claim even if the evidence at his bench trial was insufficient to warrant his convictions, the motion to dismiss should have been denied in the Superior Court and, accordingly, relief under the general superintendence powers of the court is not appropriate. The petition under G. L. c. 211, § 3, should be dismissed.[5]

So ordered.

LIACOS, J. (dissenting, with whom Abrams, J., joins). I respectfully dissent for the reasons stated in my opinion in *Commonwealth* v. *Lydon, ante.* I would remand the case to the single justice who could either rule on the sufficiency of the evidence or permit the judge of the Superior Court to reconsider the defendant's motion to dismiss. Upon a determination that the evidence at the bench trial was insufficient, the court should allow the motion to dismiss. I need not reach the question whether double jeopardy bars a retrial when the only evidence tending to prove an element of the crime was improperly admitted at the first trial. See *Greene* v. *Massey,* 437 U.S. 19, 26 n.9 (1978). I add only that if the majority's opinion in *Lydon* has any arguable validity whatsoever, the majority opinion here is even less justifiable. This defendant had no option under G. L. c. 278, § 18, as amended through St. 1974, c. 167, but was required to undergo a bench trial prior to obtaining a constitutionally protected right to trial by jury. *Supra.*

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were effective on July 1, 1979. The same result is called for under the current two-tier system. See *Lydon* v. *Commonwealth, supra* at (Mass. Adv. Sh. [1980] at 1926), quoting from Mass. R. Crim. P. 13 (c) (2), Mass. (1979).

[5]Because of our conclusion that the double jeopardy clause does not provide a valid foundation for the defendant's argument, we need not decide whether the record in fact demonstrates that the evidence was insufficient to warrant the defendant's convictions.

COMMONWEALTH OF MASSACHUSETTS.

SUPREME JUDICIAL COURT FOR THE COMMONWEALTH,
AT BOSTON,

September 17, 1980

ORDER

It is hereby ORDERED, that the Motion heretofore filed, to stay the issuance of the rescript, in each of the following cases is allowed:

SJC-2107 *Michael Lydon & another* v. *Commonwealth*
SJC-2121 *A Juvenile* v. *Commonwealth*

By the Court,

Patrick J. Hurley, Clerk

Massachusetts General Laws c. 119, § 56, as amended through St. 1977, c. 431, § 2, provides in pertinent part:

> . . . a child adjudged a delinquent child may appeal to the superior court upon adjudication, and also may appeal to said court at the time of the order of commitment or sentence, and such child shall, at the time of such adjudication and also at the time of such order of commitment or sentence, be notified of his right to appeal. If such child appeals to the superior court at either of said times, said court shall thereupon have jurisdiction of such case, and such case shall forthwith be entered in said court. The appeal, if taken, shall be tried and determined in like manner as appeals in criminal cases, except that the trial of said appeals in the superior court shall not be in conjunction with the other business of that court, but shall be held in a session set apart and devoted for the time being exclusively to the trial of juvenile cases. This shall be known as the juvenile session of the superior court, and shall have a separate trial list and docket. All appealed juvenile cases in the superior court shall be transferred to this list, and shall be tried, unless otherwise disposed of by direct order of that court. . . . Any child adjudged a delinquent in any district court in Suffolk County or in the Boston Juvenile Court, shall appeal to the Boston Juvenile Court and claim a jury of twelve in said court, if he so desires. Such claim shall be in writing. When a claim for a trial by a jury of twelve in the Boston Juvenile Court has been made under the provisions of said rules, the clerk of such district court in Suffolk County shall forthwith forward all papers in the case to the clerk of the Boston Juvenile Court. The justice presiding over a jury of twelve in said juvenile court shall have and exercise all the powers and duties which a jus-

> tice of the superior court has and may exercise in the trial and disposition of appeals under the first paragraph. . . . In the event of a trial by a jury of twelve in said juvenile court, review may be had directly by the Supreme Judicial Court by a bill of exceptions, appeal, report, or otherwise in the same manner as provided for trials by jury in the superior court. . . .

Massachusetts General Laws c. 119, § 55A, was added by St. 1978, c. 478, § 56, effective January 1, 1979. It provides:

> Trial of a child complained of as a delinquent child in a division of the district court department or of the juvenile court department shall be by a jury, unless the child files a written waiver and consent to be tried by the court without a jury, subject to his right of appeal therefrom for trial by a jury pursuant to section fifty-six. Such waiver shall not be received unless the child is represented by counsel or has filed, through his parent or guardian, a written waiver of counsel. Such trials by jury in the first instance shall be in jury sessions designated for their repective departments by the administrative justices of the district and juvenile courts for the hearing of appeals claimed pursuant to said section fifty-six. All provisions of law and rules of court relative to the hearing and trial of such appeals shall apply also to jury trials in the first instance.

Massachusetts General Laws, c. 119, § 55A, was not applicable to the instant case insofar as the juvenile petitioner's arraignment occurred on November 28, 1978.

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

NO. 80-627

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1980

A JUVENILE,
Petitioner,

v.

COMMONWEALTH OF MASSACHUSETTS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME JUDICIAL COURT OF THE
COMMONWEALTH OF MASSACHUSETTS

BRIEF FOR RESPONDENT IN OPPOSITION

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I.

QUESTIONS PRESENTED

1. Whether this Court has jurisdiction to review the decision of the Supreme Judicial Court of Massachusetts dismissing petitioner's request for relief?

2. Whether Petitioner's situation presents a double jeopardy issue under the principles of Burks v. United States, 437 U.S. 1 (1978)?

PARTIES

The parties to this case are an unnamed juvenile, the petitioner, and the Commonwealth of Massachusetts, the respondent.

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NO. ____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1980

A JUVENILE,
Petitioner,

v.

COMMONWEALTH OF MASSACHUSETTS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME JUDICIAL COURT OF THE
COMMONWEALTH OF MASSACHUSETTS

BRIEF FOR RESPONDENT IN OPPOSITION

The Commonwealth of Massachusetts respectfully asks that the petition for a writ of certiorari be denied.

OPINION BELOW

The opinion of the Supreme Judicial Court of the Commonwealth of Massachusetts is reported at Mass. Adv. Sh. (1980) 1939, 409 N.E.2d 755 (August 22, 1980). See Petition for Certiorari Appendix 1a-6a.

JURISDICTION

The Commonwealth contests the petitioner's claim of jurisdiction under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part: "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb..."

Mass. General Laws, c. 119, § 56, as amended through St. 1977, c. 431, § 2, Massachustts' de novo appeals statute, applicable to juvenile criminal defendants, which was in effect during this case is set out in the Appendix, at A-1. Massachusetts reorganized its district court trial system in 1979. The present de novo appeals statute is set out in the Appendix at A-2.

STATEMENT OF THE CASE

Petitioner, a juvenile, was arraigned on two complaints alleging him to be a delinquent child: receiving stolen goods in violation of Mass. G.L. c. 266, § 60 and possession of burglarous instruments in violation of Mass. G.L. c. 266, § 49. The

trial was held on December 19, 1978.[1/]

1/ Petitioner was tried under a two tier district court system, which has since been reorganized. Under the procedure in effect at the time of the petitioner's trial, a juvenile defendant would first be tried at a bench trial. M.G.L. c. 119, § 54 as amended through St. 1973, c. 1073, § 7. A juvenile found delinquent at a bench trial, could claim a de novo jury trial in the Juvenile Court, M.G.L. c. 119, § 56, as amended through St. 1977, c. 431, § 2. See Appendix at A-1. A juvenile was not provided an opportunity to have a first instance jury trial. This procedure was upheld by the Court in Ludwig v. Massachusetts, 427 U.S. 618 (1976), as applied to an adult defendant.

Requiring a defendant to stand trial in the first tier, before permiting the defendant a jury trial was strongly criticized by Justice Stevens. Ludwig, 427 U.S. at 634 (Stevens, J., dissenting). This problem was resolved in the Massachusetts Court Reorganization of 1978. Presently, a defendant in district court is tried in a jury session, unless the defendant explicitly waives his right to a first instance jury trial. If the defendant is dissatisfied with the first tier bench trial he may claim his right to a second tier trial in the jury session. The second tier jury session is

Petitioner, with his mother and counsel, together with the arresting police officer and three witnesses for the Commonwealth appeared before the juvenile session of the West Roxbury District Court. The Commonwealth was not represented by counsel. The trial was held in the judge's chambers and was not recorded.

After all the witnesses were sworn, the police officer testified that he responded to a radio call, went to a certain address and arrested the petitioner. He found part of a coat hanger and a screwdriver on the

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Footnote No. 1 continued.

de novo; the sentence imposed at the bench trial is vacated. M.G.L. c. 119, § 55A inserted by St. 1978, c. 478, § 56 effective January 1, 1979. See Appendix at A-1,2.

petitioner. When the officer began to testify to statements made to him by the witnesses, defense counsel objected. The judge overruled the objection and once more the officer testified as to statements made to him by the witness. Again, defense counsel objected. After determining that the witnesses, whose statements formed the basis of the policeman's testimony, were present in chambers, the judge denied the objection and directed the officer to continue.

The police officers' testimony, based on the statements of the witnesses, was the only evidence presented on the charge of receiving stolen goods. What the evidence was on the charge of possession of burglarous instruments is not disclosed by the record.

At the close of the officer's testimony, the judge asked the Commonwealth's witnesses, jointly, if they could corroborate the officer's testimony - they replied affirmatively. The juvenile offered no evidence. The judge found the juvenile a delinquent child on both counts.

The juvenile claimed a trial de novo. After arraignment in the Appellate Division of the Boston Juvenile Court, his counsel moved to dismiss the complaint. Counsel contended that double jeopardy principles, as enunciated by this Court in Burks v. United States, 437 U.S. 1 (1978), barred a second trial because there was insufficient competent evidence to sustain a finding of delinquency. The second tier judge denied defendant's motion to dismiss and remanded

the cases to District Court for another hearing.[2/]

Defense counsel then sought relief from this order before a single justice of the Supreme Judicial Court under the Court's general superintendence powers. M.G.L. c. 211, § 3. The single justice stayed the

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2/ The second tier judge did not articulate the reasons for denying defendant's motion to dismiss or for remanding the case to the first tier juvenile session. Defense counsel argued, on the motion, that the defendant had been denied both his right to confrontation of the witnesses against him, and his right of cross-examination, and also that the evidence at the first tier bench trial was insufficient. The prosecutor suggested that the trial judge may have been confused concerning the nature of the proceedings - the trial judge treated the proceedings as a plea to sufficient facts rather than a trial. It is also entirely possible that the second tier judge considered the improper admission of hearsay testimony to be a trial error. United States v. Scott, 437 U.S. 82 (1978).

lower court's proceedings pending the resolution of the questions which he reserved and reported to the full bench.

In his reservation and report, the single justice considered the following to be the principle question raised:

> Whether the juvenile's constitutional right not to be twice put in jeopardy for the same offense would be violated if he were required to stand trial de novo in the Appellate Division of the Boston Juvenile Court on two charges as to which the admissible, nonhearsay evidence presented by the Commonwealth thereon in the prior hearing in the juvenile session of the district court was not sufficient to support a finding of guilty beyond a reasonable doubt. See Burks v. United States, 437 U.S. 1 (1978)."

The Supreme Judicial Court answered the question in the negative, stating that, "a double jeopardy claim based on the

principles of Burks v. United States has no validity in our former two tier trial system." A Juvenile v. Commonwealth, Mass. Adv. Sh. (1980) 1939, 1943, 409 N.E.2d 755, 757. The Court then dismissed the petition.

REASONS FOR DENYING THE WRIT OF CERTIORARI

I. THIS COURT LACKS JURISDICTION

A. There is no final judgment from the Supreme Judicial Court of Massachusetts

The jurisdiction of the Supreme Court, on review of state decisions, extends only to "final judgments or decrees rendered by the highest court of a state in which a decision could be had." 28 U.S.C. § 1257 In the petitioner's case there is no final judgment rendered by the Supreme Judicial Court of Massachusetts. Not only is there no final judgment, but there is no judgment

whatsoever. The petitioner was found to be a delinquent child in a first tier bench trial.[3/]. He immediately noted his claim of appeal for a trial de novo. Under the two tier district court trial system, the claim of appeal for a trial de novo vacated the sentence imposed at the bench trial. M.G.L. c. 278, § 18 (1972). Enbinder v. Commonwealth, 368 Mass. 214, 217, 330 N.E.2d 846, cert. denied, 423 U.S. 1024 (1975), Commonwealth v. Costarelli, 421 U.S. 193, 194 (1975). Under Massachusetts District Court procedure there is no sentence outstanding against the petitioner. Since there is no

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3/ See note 1 describing the present and former two tier district court trial system in Massachusetts.

sentence, there is no final judgment.[4/]

B. The exceptions to the final judgment rule do not apply

Since there is no explicit judgment on the record, the Court's jurisdiction must be based on an exception to the final judgment rule. This Court in Cox Broadcasting v. Cohn, 420 U.S. 469 (1975) established four analytic categories where Supreme Court review would be possible without a traditional final judgment. In addition this Court in Harris v. Washington, 404 U.S. 55 (1971) (per

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4/ Parr v. United States, 351 U.S. 513, 518 (1956); Berman v. United States, 302 U.S. 211, 212-213 (1937) ("final judgment in a criminal case means sentence. The sentence is the judgment.").

curiam); Abney v. United States, 431 U.S. 651 (1977) and; Costarelli v. Massachusetts, 421 U.S. 193 (1975) (per curiam) dealt specifically with the jurisdictional problems concerning review of double jeopardy issues.

The petitioner's case does not fit into the four exceptions to the final judgment requirement set out in Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 477-87 (1975). First, the outcome of the remand proceeding in juvenile court is not pre-ordained. The petitioner may be found delinquent or acquitted; even if he is adjudicated a delinquent, the petitioner retains his right to a de novo trial in the jury session. Second, the state court proceedings may eliminate the federal issue. The juvenile hearing may acquit the

petitioner. Alternatively, a clear decision from the second tier judge would resolve whether the petitioner's first trial was defective due to insufficient evidence, denial of the right of confrontation, denial of cross-examination, error in admitting hearsay testimony, or simple confusion of purpose. The outcome of future state court proceedings will determine whether the federal issue survives. Third, the future state court proceedings will not necessarily moot the federal issue. In a companion case to the A Juvenile, Lydon v. Commonwealth, Mass. Adv. Sh. (1980) 1915, 1926, 409 N.E.2d 745, 752, the Massachusetts Supreme Judicial Court determined that a motion to dismiss for double jeopardy would properly be presented to the second tier trial court, and in Whitmarsh v. Commonwealth, 366 Mass.

212, 316 N.E.2d 610 (1974) the Court held that if the motion were denied, and the plaintiff convicted he would have an opportunity for appellate review of the ruling on his motion. Fourth, although the double jeopardy issue has been decided by the Supreme Judicial Court, reversal of the state court on the federal issue would not preclude further litigation. Even if this Court were to reverse the Massachusetts Supreme Judicial Court further proceedings would be required to determine the basis of the remand to the juvenile session. None of the four categories developed in Cox, supra, 420 U.S. at 479-83 fit the peculiar factual and procedural circumstances of the petitioner's situation.

In Harris v. Washington, 404 U.S. 55 (1971) (per curiam) the Supreme Court

reviewed a Washington Supreme Court decision which denied the defendant's motion to dismiss. While the language in Harris appears to apply to this case, the facts and procedural posture of the case are significantly different. The defendant in Harris had recently been acquitted of the same charge, stemming from the same conduct, with a different victim. This Court in a per curiam opinion applied the collateral estoppel principles of Ashe v. Swenson, 397 U.S. 436 (1970) and reversed the Washington decision. In contrast the petitioner's case involves the retrial of a single charge. In Harris the decision of the Supreme Court terminated the action. In the petitioner's situation, even if this Court finds for the petitioner on the merits, a new hearing will be required to determine the reason for the remand.

In Abney v. United States, 431 U.S. 651 (1977), a case involving a double jeopardy claim, this Court determined that although the federal district courts' pre-trial denial of a motion to dismiss was not a final order, the motion could be appealed as a collateral order. Abney, supra, 431 U.S. at 659; Cohen v. Beneficial Industrial Loan Corp. 337 U.S. 541 (1949). In Abney, however, there was a clear Federal District Court conviction, and a clear Appeals Court reversal on evidentiary grounds. The factual basis for consideration of the motion to dismiss was well presented. In contrast, the factual basis of the petitioner claim is unclear. First, the petitioner's claim of a trial de novo vacated his juvenile court sentence, there is no conviction on the record. Second,

the Superior Court judge denied plaintiff's motion to dismiss for double jeopardy and remanded the case to the first tier juvenile court without a specific finding. The Massachusetts Supreme Judicial Court considered the question reported by a single justice of the effect of a finding of insufficient evidence in a first tier juvenile proceeding,[5/] however, the single justice does not sit as a reviewing court; he does not adjudicate the rights of the parties, his conclusion is simply to frame the issue for the full bench. See Lydon v. Commonwealth, Mass. Adv. Sh. (1980) 1915, 1918 n.6, 409 N.E.2d 745, 748 n.6. The petitioner's record does not

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5/ See p. 9, supra, for the text of the question reported by the single justice.

provide the lower court conviction, or the clear basis for the denial of the motion to dismiss which formed the basis of the court's decision in Abney.

As well as being distinguishable on the facts, Abney is distinguishable on the law. In Abney the Supreme Court reviewed the decision of the Third Circuit Court of Appeals under 28 U.S.C. § 1291. Federal precedent under 28 U.S.C. § 1291 is not fungible with cases reviewing state judgments under 28 U.S.C. § 1257. Wright, Miller, Cooper & Gressman, Federal Practice and Procedure: Jurisdiction § 6004 (1971). Supreme Court review under 28 U.S.C. § 1257 involves considerations of federalism and comity between the state and federal judiciary not present when this Court reviews federal decisions.

Costarelli v. Massachusetts, 421 U.S. 193 (1975) (per curiam) presents the closest factual precedent to the petitioner's situation. In Costarelli, this Court held that it did not have jurisdiction under 28 U.S.C. § 1257 to review the defendant's double jeopardy claim since there had not been a decision from the Massachusetts Supreme Judicial Court. This Court relied on the decision of the Massachusetts court in Whitmarsh v. Commonwealth, 366 Mass. 212, 316 N.E.2d 610 (1974). Where the Supreme Judicial Court indicated that the defendant could raise the double jeopardy issue on appeal through the Massachusetts courts.

In this case, the petitioner received a review of his claim from the Supreme Judicial Court of Massachusetts. The

Massachusetts court considered and rejected the petitioner's claim under its statutory supervisory authority over the inferior courts of Massachusetts. M.G.L. c. 211, § 3.[6/] The ability of the Supreme Judicial Court to review the petitioner's claim, does not necessarily indicate that this Court is authorized to review the decision. M.G.L. c. 211, § 3 is a very broad grant of authority to review the practices of the inferior courts of Massachusetts. In contrast 28 U.S.C. § 1257 is a limited grant of authority to review the final decisions of state courts; the review authority provided by the two statutes is not coextensive. The

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6/ See Appendix at A-3 for text of M.G.L. c. 211, § 3.

petitioner's case was reviewable by the Supreme Judicial Court but is not reviewable by this Court.

In Costarelli, this Court noted that "an important purpose of the requirement that we review only final judgments of highest available state courts is to prevent our interference with state proceedings when the underlying dispute may otherwise be resolved." Costarelli, at 196. That purpose guided this court in Costarelli, and it should guide the result of this petition. The record supporting petitioner's claim does not include a sentence from the District Court or a final judgment from the Supreme Judicial Court. The record also does not indicate the reasons for the remand to the juvenile session. The underlying dispute in this

case may well be resolved by further state proceedings. The record in petitioner's case does not provide this Court jurisdiction under 28 U.S.C. § 1257.

II. THE CASE DOES NOT PRESENT A DOUBLE JEOPARDY ISSUE, AS THERE WAS NO APPELLATE DETERMINATION OF INSUFFICIENT EVIDENCE.

This Court in Burks v. United States, 437 U.S. 1 (1978) held that an appellate finding that a trial court conviction was based on insufficient evidence would act as an acquittal; double jeopardy would prevent a new trial after a determination that the prosecution had failed to present sufficient evidence at the first trial. The critical aspect of Burks is the appellate determination of insufficient evidence. Petitioner's case does not

present such an appellate determination. Petitioner's motion to dismiss was denied by the jury session of the juvenile court. The case was remanded to the West Roxbury District Court for another hearing. The basis for the remand is not clear from the record.[7/] The absence of a clear determination of insufficient evidence distinguishes petitioner's case from Burks.

The underlying policy of the double jeopardy clause is also not presented in this case. The policy of the double jeopardy clause is that,

> permitting the sovereign freely to subject the citizen to a second trial for the same offense would arm government with a potential instrument of oppression.

7/ See note 2, supra, for the arguments presented at the hearing on the motion.

United States v. Martin Linen Supply Co., 430 U.S. 564, 569 (1977). See also, Green v. United States, 355 U.S. 184, 187-88 (1957). The Commonwealth of Massachusetts is not subjecting the defendant to a second trial. The petitioner appealed from his bench trial to the second tier jury session. The petitioner's voluntary action forced a de novo trial - not the power of the state.

III. THE RECORD IS NOT SUFFICIENT TO SUPPORT SUPREME COURT REVIEW

Assuming that this Court finds jurisdiction under the principles of Abney v. United States, 431 U.S. 651 (1977); Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975); and Harris v. Washington, 404 U.S. 55 (1971) (per curiam), review of this case would not be prudent. Approximately one

half of the states have some form of a two tier criminal trial system, with appeal from the first tier to a de novo trial at the second tier.[8/] A decision in this case will therefore have tremendous effect on the criminal trial system in the United States. The record in this case is insufficient to support a constitutional decision of such magnitude.

The record of the proceedings involving the petitioner does not clearly present the double jeopardy issue. Petitioner first argued the double jeopardy issue in a motion to dismiss. That motion was denied, and the case remanded without any specific finding. A single justice of the Supreme

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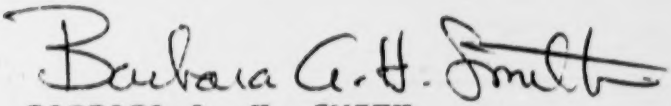
8/ See Petition for Writ of Certiorari at note 6.

Judicial Court acting under the court's general superintendence power, M.G.L. c. 211, § 3, reported a question to the full bench of the Supreme Judicial Court. While this slim record, with no specific finding of insufficiency by the trial court, coupled with a reported question from a single justice, is enough for review by the Supreme Judicial Court of Massachusetts, under its general superintendence authority - it would be unwise for the Supreme Court to build broad constitutional principles on such a weak foundation. This Court would be forced into the position of speculating on the rationale for the trial court's denial of the petitioner's motion. Speculation is simply not a prudent basis for Supreme Court review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,
FRANCIS X. BELLOTTI
ATTORNEY GENERAL



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APPENDIX A-1

Massachusetts General Laws c. 119, § 56, as amended through St. 1977, c. 431, § 2, provides in pertinent part:

> . . . a child adjudged a delinquent child may appeal to the superior court upon adjudication, and also may appeal to said court at the time of the order of commitment or sentence, and such child shall, at the time of such adjudication and also at the time of such order of commitment or sentence, be notified of his right to appeal. If such child appeals to the superior court at either of said times, said court shall thereupon have jurisdiction of such case, and such case shall forthwith be entered in said court. The appeal, if taken, shall be tried and determined in like manner as appeals in criminal cases, except that the trial of said appeals in the superior court shall not be in conjunction with the other business of that court, but shall be held in a session set apart and devoted for the time being exclusively to the trial of juvenile cases. This shall be known as the juvenile session of the superior court, and shall have a separate trial list and docket. All appealed juvenile cases in the superior court shall be transferred to this list, and shall be tried, unless otherwise disposed of by direct order of that court. . . . Any child adjudged a delinquent in any district court in Suffolk County or in the Boston Juvenile Court, shall appeal to the Boston Juvenile Court and claim a jury of twelve in said court, if he so desires. Such claim shall be in writing. When a claim for a trial by a jury of twelve in the Boston Juvenile Court has been made under the provisions of said rules, the clerk of such district court in Suffolk County shall forthwith forward all papers in the case to the clerk of the Boston Juvenile Court. The justice presiding over a jury of twelve in said juvenile court shall have and exercise all the powers and duties which a jus-

> tice of the superior court has and may exercise in the trial and disposition of appeals under the first paragraph. . . . In the event of a trial by a jury of twelve in said juvenile court, review may be had directly by the Supreme Judicial Court by a bill of exceptions, appeal, report, or otherwise in the same manner as provided for trials by jury in the superior court. . . .

Massachusetts General Laws c. 119, § 55A, was added by St. 1978, c. 478, § 56, effective January 1, 1979. It provides:

> Trial of a child complained of as a delinquent child in a division of the district court department or of the juvenile court department shall be by a jury, unless the child files a written waiver and consent to be tried by the court without a jury, subject to his right of appeal therefrom for trial by a jury pursuant to section fifty-six. Such waiver shall not be received unless the child is represented by counsel or has filed, through his parent or guardian, a written waiver of counsel. Such trials by jury in the first instance shall be in jury sessions designated for their repective departments by the administrative justices of the district and juvenile courts for the hearing of appeals claimed pursuant to said section fifty-six. All provisions of law and rules of court relative to the hearing and trial of such appeals shall apply also to jury trials in the first instance.

Massachusetts General Laws, c. 119, § 55A, was not applicable to the instant case insofar as the juvenile petitioner's arraignment occurred on November 28, 1978.

APPENDIX A-3

Massachusetts General Laws c. 211, § 3 provides:

The supreme judicial court shall have general superintendence of all courts of inferior jurisdiction to correct and prevent errors and abuses therein if no other remedy is expressly provided; and it may issue all writs and processes to such courts and to corporations and individuals which may be necessary to the furtherance of justice and to the regular execution of the laws.

In addition to the foregoing, the justices of the supreme judicial court shall also have general superintendence of the administration of all courts of inferior jurisdiction, including, without limitation, the prompt hearing and disposition of matters pending therein, and the functions set forth in section three C; and it may issue such writs, summonses and other processes and such orders, directions and rules as may be necessary or desirable for the furtherance of justice, the regular execution of the laws, the improvement of the administration of such courts, and the securing of their proper and efficient administration. Nothing herein contained shall affect existing law governing the selection of officers of the courts, or limit the existing authority of the officers thereof to appoint administrative personnel.